IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 3592 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NIKHIL P GANDHI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 3592 of 2000

MR DEVANG NANAVATI FOR NANAVATI & NANAVATI for Petitioners

MS NANDINI JOSHI APP for Respondent No. 1

MR SUREN M SHAH for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 19/09/2003

ORAL JUDGEMENT

1. In this petition which is filed under Section 482

of the Code of Criminal Procedure, 1973 ('the Code' for short hereinafter), petitioners against whom Criminal Complaint No.44 of 2000 is filed by respondent No.2 ('complainant' for short) in the Court of learned Judicial Magistrate, First Class, Mahuva, in which process has been issued and also inquiry under Section 202 of the Code is ordered, have prayed to quash and set aside the said complaint, process issued thereunder and also the inquiry ordered therein, on the grounds stated in the petition.

2. A private complaint came to be filed in the Court of learned Judicial Magistrate, First Class, Mahuva, District Bhavnagar by the complainant, Bipin Shantilal Shah against the petitioners for commission of the alleged offences under Sections 406, 415, 418, 420, 422, 468 and 469 read with Section 114 of the Indian Penal Code ("the IPC" for short hereinafter).

2.1. It is, inter alia, alleged in the said complaint that the complainant is the proprietor of M/s. Riddhi Siddhi Builders, at Mahuva, in Bhavnagar District. Gujarat Pipavav Port Limited ('GPPL' for short hereinafter) was in need of residential buildings for its executives and staff at Mahuva and, therefore, petitioner No.1 in his capacity as Managing Director and Vice Chairman of GPPL contacted the complainant for purchasing about 65 residential flats constructed by the complainant. It is also mentioned in the said complaint that the price of the flats was determined at Rs.900 per sq.ft. It is further stated in the said complaint that necessary resolution was passed by the Board of Directors of GPPL on October 17, 1996 authorising petitioner No.1 to purchase total 65 residential flats from the complainant for a total value of Rs.3,77,91,000/- It is also alleged in the said complaint that a part payment of Rs.50,00,000/- towards earnest money of above consideration was paid by GPPL by cheque bearing No.154881 dated December 12, 1997 drawn on HDFC Bank, Mumbai and the same was handed over to the complainant. It is alleged in the complaint that petitioner No.1 had been repeatedly requested by the complainant to execute the sale-deed for purchasing 65 flats and also requested to make the balance payment but petitioner No.1 did not make the payment and, therefore, the complainant was obliged to serve a legal notice dated January 20, 2000 addressed to GPPL stating therein that GPPL had agreed to purchase 65 flats from the complainant at and for a price of Rs.3,77,91,000/- out of which Rs.50,00,000/- were paid by way of earnest money and called upon GPPL to pay the balance amount of Rs.3,27,91,000/- It is also stated

therein that in the event the complainant treats the said agreement as having been terminated by GPPL and proceeds to sell the said flats to third parties, such sale to a third party shall be without prejudice to the complainant's right to recover the deficit in the sale price, if any, and to claim damages with interest at the rate of 36% per annum.

2.3. The petitioner No.1 replied to the said notice on March 9, 2003 denying the contents of the notice issued by the complainant. It is also stated in the reply that the terms and conditions of purchasing those flats were not acceptable to the complainant and, therefore, negotiations which took place between the complainant and petitioner No.1 had failed and it is also stated therein that the payment of RS.50,00,000/- made to the complainant is not for purchase of 65 flats but it was a payment made to M/s. Sharda Steel Corporation, which is a sister concerned of the proprietary firm of the complainant i.e., M/s. Riddhi Siddhi Corporation, towards the payment of purchase of goods and materials from M/s. Sharda Steel Corporation and for that purchase the aforesaid amount has been credited in favour of GPPL in the books of accounts of M/s. Sharda Steel Corporation. Notwithstanding the reply sent by the petitioner No.1, it is alleged by the complainant that the petitioners have committed offences under Sections 406, 415, 418, 420, 422, 468 and 469 read with Section 114 of the IPC and, therefore, the complaint has been filed to which reference is made earlier.

2.4. The learned Judicial Magistrate, First Class, Mahuva on receipt of the complaint, examined the complainant on oath and has ordered to register the complaint under Section 202 of the Code and also to issue process against the petitioners for commission of the offences as alleged in the said complaint. It is this order by which the learned Judicial Magistrate, First Class has passed the order to register the complaint under section 202 of the Code and also to issue process against the petitioners that has given rise to the present petition at the instance of the petitioners who are figured as accused in the said complaint.

3. By filing this petition, the petitioners have contended that all the allegations and averments made in the complaint are false and in fact there was no agreement between the complainant and GPPL to purchase flats as stated in the complaint. On the contrary, according to the petitioners, the complainant came to the office of GPPL to sell flats and only preliminary

negotiations had taken place between them and during the negotiations, certain terms and conditions were also discussed for improving the construction and price as well but the complainant refused to accept the said terms and conditions and, therefore, no agreement was arrived at between the complainant and GPPL.

3.1. It is also contended that Rs.50,00,000/- has not been paid as earnest money to the complainant for purchasing 65 flats but has been paid to M/s. Sharda Steel Corporation for purchasing different materials and goods and M/s. Sharda Steel Corporation has credited the said amount in their books of accounts. It is further contended that M/s. Sharda Steel Corporation had filed Civil Suit No.36 of 2000 in the Court of learned Civil Judge (S.D.)., Amreli for recovery of the amount from GPPL.

3.2. It is further contended that though a Civil Suit was filed by M/s. Sharda Steel Corporation, which is a sister concern of M/s. Riddhi Siddhi Builders, against GPPL, they could not obtain favourable order below application Ex.5 from the Civil Court (S.D.)., Amreli and, therefore, the complainant has used the Court machinery for its oblique purpose and filed the aforesaid malicious and vexatious complaint against the petitioners.

3.3. It is also asserted by the petitioners that alleged transaction stated in the complaint is arising out of the contractual obligations and, therefore, the complainant has given a colour of criminal offence which is nothing but a civil transaction. It is also contended that the complainant is having remedy available under the civil law and the impugned complaint is nothing but an abuse of the process of law. It is further contended that the allegations made in the complaint in respect of the offences under sections 406, 415, 418, 420, 422, 468 and 469 read with section 114 of the IPC do not constitute a prima facie case against the petitioners. It is also submitted that no ingredient of criminal breach of trust, or cheating or forgery for the purpose of cheating is pointed out by the complainant.

3.4. It is also emphasised that mere allegation about breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right in the beginning of the transaction and, therefore, no prima facie case is made out by the complainant. It is also contended that as there was no agreement between the complainant and GPPL,

question does not arise of becoming a debtor to the complainant inasmuch as no sale deed has been executed between the parties. Moreover, there is no contract entered into between the complainant and the petitioners and, therefore, provisions of Section 422 of IPC cannot be attracted.

3.5. It is also stressed that the complainant has not made any allegation that the petitioners were in charge of the day-to-day affairs of GPPL nor made any averment that they are directly or indirectly involved in the alleged transaction mentioned in the complaint. Moreover, there is not even a whisper, or shred of evidence or anything to show that there is any act committed by the petitioners from which a reasonable inference can be drawn that they could also be held vicariously liable.

3.6. It is also emphatically contended that petitioner No.3, Mr. P. Roy Chaudhary is a nominee of Gujarat Maritime Board, petitioner No.4, Mr. Arvind Desai is a Secretary of Department of Ports and Fisheries and petitioner No.5, Mr. B.R. Mahera, is a Collector of Central Excise and, therefore, they are public servants. Petitioner No.7, Mr. Pradip Roy is a nominee of Industrial Development Bank of India and petitioner No.8, Mr. P. Mohnot is a nominee of Unit Trust of India, which is a Government of India Undertaking and, therefore, they are also public servants. Therefore, in view of Section 197 of the Code, no criminal prosecution can be launched against those public servants without prior sanction of the respective Governments as they were acting in discharge of their official duties and therefore no court shall take cognizance of any of the offences. It is also highlighted that in the cause title of the complaint the complainant has stated that they were nominee Directors or employees of the State as well as Central Government. Inspite of that the learned Judicial Magistrate, First Class, Mahuva has not applied his mind and issued the summons to those Directors and, therefore, the complaint itself is bad in law and the same is filed with a view to abuse the process of law.

3.7. On the aforesaid premise, it is prayed to quash and set aside the complaint as well as the process issue thereunder and also inquiry as order under Section 202 of the Code by the learned Judicial Magistrate, First Class, Mahuva, District Bhavnagar.

4. It may be noted that no reply affidavit is filed by the complainant controverting the averments made in

the petition and, therefore, the averments made in the petition go unchallenged.

5. Mr. Devang Nanavati, learned advocate for the petitioners, contended that there is no prima facie case against the petitioners for commission of the alleged offences under sections 406, 415, 418, 420, 422, 468 and 469 read with section 114 of the IPC. It is also emphasised by the learned advocate that the averments made in the petition are eloquent and speak volumes of non-disclosure of offences. However, the complaint came to be filed, process came to be issued thereunder and inquiry is also ordered under section 202 of the Code and, therefore, the same deserves to be quashed and set aside.

5.1. It is also pointed out by him that there is no mens-rea on the part of the petitioners as there was no agreement entered into between the complainant and the GPPL for purchase of flats. According to him, it is true that preliminary negotiations had taken place between the GPPL and the complainant. However, as the complainant refused to accept the terms and conditions offered by GPPL, no agreement was arrived at between the complainant and GPPL. What is stressed by the learned advocate is that Rs.50 lakhs which has been paid by GPPL was not towards the consideration of the purchase of flats but it was paid to M/s. Sharda Steel Corporation, which is a sister concern of he complainant, and the said firm M/s. Sharda Steel Corporation has rightly credited the said amount in their books of accounts in the name of GPPL.
5.2. Attention of this Court is also drawn to the xerox copy of the interim application filed by the complainant in Special Civil Suit No.125 of 2000 filed in the Court of learned Civil Judge (S.D.)., Amreli claiming interim injunction against GPPL qua alienation or transfer of the property to show that there is a civil dispute between the complainant and GPPL and there was no mens-rea on the part of GPPL or its Directors either to cheat the complainant or commit breach of trust or forgery.

5.3. Lastly, it is contended that petitioner No.3 is a Nominee of Gujarat Maritime Board, petitioner No.4 is the Secretary, Department of Ports and Fisheries, petitioner No.5 is the Collector of Central Excise and they are public servants as defined under section 21 of IPC. Petitioner Nos.7 and 8 are the nominee Directors of IDBI and UTI respectively and they can also be termed as public servants. Therefore, without obtaining prior sanction under Section 197 of the Code from the

respective Government, no criminal prosecution can be launched against these public servants as they were discharging their official duties in the capacity of public servants. Notwithstanding the aforesaid facts, the learned Magistrate has taken cognizance against these Directors also and, therefore, on this ground also the criminal prosecution launched against these Directors is ex-facie illegal and against the statutory provisions contained in Section 197 of the Code and deserves to be quashed.

5.4. In support of the aforesaid contentions, Mr. Nanavati has placed reliance on the following decisions:

(i) Punjab National Bank and others v. Surendra Prasad Sinha, AIR 1992 SC 1815.
(ii) Rosy and another v. State of Kerala and others, (2000) 2 SCC 230.
(iii) Vadilal Panchal v. Dattatraya Dulaji Ghadigaonkar and another, AIR 1960 SC 1113.
(iv) Ashim Kumar Roy v. Bipinbhai Vadilal Mehta and others, (1998) 1 SCC 133.
(v) Nageshwar Prasad Singh alias Sinha v. Narayan Singh and another, AIR 1999 SC 1480.
(vi) Gauri Shankar Prasad v. State of Bihar and another, (2000) 5 SCC 15.
(vii) State through the CBI v. B.L. Verma and another, (1997) 10 SCC 772.
(viii) Hridaya Ranjan Prasad Verma and others v. State of Bihar and another, (2000) 4 SCC 168.

5.5. On all the aforesaid premise, it is urged by the learned advocate that the petition may be allowed by quashing and setting aside the Criminal Case No.44 of 2000 filed by the complainant against the petitioners before the learned Judicial Magistrate, First Class, Mahuva and the process issued thereunder and also the inquiry ordered under Section 202 of the Code.

6. Ms. Nandini Joshi, learned APP, has opposed the prayers made in the petition by contending that reading of the complaint as a whole prima facie case is made out disclosing the ingredients of the offences alleged against the petitioners. She further contended that the complaint has to be examined as a whole without going into merits of the allegations made therein. According to her, mere fact that the offences were committed during the course of a commercial transaction by itself is not sufficient to quash the complaint but the Court has to see whether on the fact situation 'civic profile'

outweighs the 'criminal outfit' for quashing the complaint. Moreover, affirmation of the complainant on solemn affirmation has been considered and after applying mind the learned Magistrate has issued process. According to the learned A.P.P., whatever averments made in the memo of petition is in the nature of defence which cannot be considered in a petition filed under Section 482 of the Code as the same can be considered at the time of trial and it is too premature to judge the defence before the same is laid and the same is probabilised. Therefore, it is contended that there is no substance in the challenge made in the petition and the learned Magistrate has rightly issued process which does not warrant interference of this Court in exercise of powers under section 482 of the Code and hence the petition deserves to be rejected and, therefore, learned APP prayed that the petition may be rejected.

6.1. In support of the aforesaid submission, learned APP has placed reliance on the judgment of the Supreme Court in the case of Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd., and others, (2000) 3 SCC 269.

7. The complainant, who is respondent No.2 in this petition, is represented through Mr. Suren M. Shah, learned advocate of this Court. This matter was called out on a number of occasions. The learned advocate for respondent No.2 did not remain present for making his submissions. Therefore, this Court has proceeded to decide this petition in his absence by considering the averments made in the petition as well as in the complaint on their own merits.

8. I have considered the submissions advanced by the learned advocates appearing for the parties. I have also perused the averments made in the petition which are stated on oath and the decisions cited at the Bar.

9. On the facts and circumstances emerging from the record of the case, following aspects have remained unassailable which are not disputed by the complainant as no reply affidavit is filed by him.

(i) Petitioner No.3 is a Nominee of Gujarat Maritime Board, petitioner No.4 is Secretary, Department of Ports and Fisheries, petitioner No.5 is Collector of Central Excise and they are public servants under the provisions of Section 21 of the IPC whereas petitioners Nos.7 and 8 are nominee Directors of IDBI and UTI respectively and they can also be termed as public servants.

(ii) The complainant firm is engaged in the business of construction building. GPPL was in need of residential flats for its staff at Mahuva and therefore there were preliminary negotiations between the complainant and the GPPL for purchasing about 65 flats by the GPPL but the complainant refused to accept the terms and conditions proposed by GPPL and hence the said negotiations could not be finalised and hence there was no agreement arrived at between the complainant and GPPL.

(iii) Rs.50,00,000/- paid by the GPPL was not towards consideration of purchase of flats but it was paid to M/s. Sharda Steel Corporation, which is a sister concern of the complainant firm, towards the purchase goods/materials from Sharda Steel Corporation and therefore it was correctly credited in the books of accounts of Sharda Steel Corporation in the account of GPPL. In reply to the notice sent by GPPL to the complainant, the said aspect was clarified.

(iv) The complainant has filed Special Civil Suit No.125 of 2000 against GPPL before the learned Civil Judge (S.D.)., Amreli. In the said suit, application Ex.5 was also moved for interim relief wherein the relief claimed was to restrain the GPPL from transferring or alienating its properties till the disposal of the suit. The learned Civil Judge (S.D.)., Amreli dismissed the said application.

10. In the aforesaid backdrop of the factual aspects which have remained uncontroverted, the question which falls for determination of this Court is as to whether offences as alleged in the complaint are committed by the petitioners or not.

11. In this connection, it would be appropriate to refer to the ingredients which are necessary to constitute offences under Sections 406, 415, 418, 420, 422, 463, 468 and 469 of the IPC.

12. The following are the ingredients to constitute an offence under Section 406 of IPC. The prosecution must prove:

(i) that the accused was entrusted with property or with dominion over it,

(ii) that he (a) misappropriated it, or (b) converted it to his own use, or (c) used it, or (d) disposed it of.

13. To constitute an offence of cheating under Section 415 of the IPC, the prosecution must prove the following ingredients:

Whoever, by deceiving any person, -
(a) fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or
(b) intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation or property or wrongful gain to any person,
is said to "cheat".

14. To constitute an offence of cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect under Section 418 of the IPC, the prosecution must prove the following ingredients:

(i) that the accused cheated some person;
(ii) that he was under a legal obligation to protect the interest of that person;
(iii) that the cheating had relation thereto;
(iv) that he knew he was likely to cause wrongful loss to such person.

15. To constitute an offence under Section 420 of the IPC, the prosecution must prove that the accused has dishonestly induced any person to do the following:

(a) to deliver any property to any person, or
(b) to consent that any person shall retain any property, or
(c) to make, alter or destroy the whole or any part of a valuable security, or
(d) to make, alter or destroy anything which is signed or sealed and which is capable of being converted into a valuable security.

16. To constitute an offence of dishonestly or fraudulently preventing debt being available for creditors under Section 422 of the IPC, the prosecution must prove the following ingredients:

(i) that the debt or demand was due to the accused, or some other person;
(ii) that the accused prevented such debt or demand from being made legally available for his debts, or for the debts of another person;
(iii) that he did as above dishonestly or fraudulently.

17. To constitute an offence of forgery under Section 463 of the IPC, the prosecution must establish the following ingredients:

(i) the document or part of the document must be false;
(ii) it must have been made dishonestly or fraudulently in one of the three modes specified in Section 464; and
(iii) it must have been made with intent:
(a) to cause damage or injury to (i) the public, or (ii) any person; or
(b) to support any claim or title; or
(c) to cause any person to part with property; or
(d) to cause any person to enter into an express or implied contract; or
(e) to commit fraud or that fraud may be committed.

18. To constitute an offence of forgery for purpose of cheating under Section 468 of the IPC, the prosecution must establish the following ingredients:

(i) that the document is a forgery;
(ii) that the accused forged the document;
(iii) that he did as above intending that the forged document would be used for the purpose of cheating.

19. To establish an offence of forgery for purpose of harming reputation under Section 469 of the IPC, the prosecution has to establish the following ingredients:
(i) that the document in question is a forgery;
(ii) that the accused forged it;
(iii) that he did so intending that the document forged would harm ther reputation of some one, or knew that it was likely to be used for that purpose.

20. Section 463 of the IPC deals with Forgery, Section 468 of the IPC deals with forgery for purpose of cheating and Section 469 deals with forgery for purpose of harming reputation and in the instant case, provisions of these sections cannot be attracted because in the complaint there is no allegation with regard to making

any false document or part of a document with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud on the ground that the petitioners had not executed any contract with the complainant nor claiming any title over the property of the complainant, nor any express or implied contract has been executed; nor intention to commit fraud with the complainant and, therefore, there is no question of committing an offence under Section 463 of Forgery or there is no ingredient of committing any offence under section 468 forging a document which may be used for the purpose of cheating nor damaging any reputation of the complainant intending to use the forged document with an intention to harm the reputation of the complainant and therefore the process issued under sections 468 and 469 of IPC ought not have been issued by the learned Judicial Magistrate, First Class, Mahuva and since the learned Magistrate has issued the process same deserves to be quashed and set aside on this ground also.

21. On having fair look to the averments made in the complaint filed by the complainant against the petitioners and in view of the uncontroverted and unassailable aspects which I have narrated in the preceding paragraphs of this judgment, there is no manner of doubt that there was any intention on the part of the petitioners to commit breach of trust or cheating or inducement. There was no agreement to purchase flats from the complainant by GPPL. For the sake of argument, even if it is accepted that there was an oral agreement, then also it is a civil dispute between the parties and, therefore, the complainant has rightly filed Civil Suit No.125 of 2000 in the Court of learned Civil Judge (S.D.)., Amreli, which is produced alongwith the written submissions tendered by the learned advocate for the petitioners.

22. In the case of S.N. Palanitkar and others v. State of Bihar and another, reported in 2001 AIR SCW 4435, the Supreme Court has held that when there is nothing either in the complaint and/or in the sworn statements of complainant and witnesses that any property was entrusted to any of the accused at all or the accused had domain over any of the properties of complainant which they dishonestly converted to their own use so as to satisfy the ingredients of Section 405, it cannot be said that accused committed offence under section 405. The Supreme Court has further observed that for constituting offence under Section 420, that is,

cheating, intention to deceive should be in existence at the time when inducement was made and mere failure to keep up promise subsequently cannot be presumed as leading to cheating. Ultimately, in the said case, the Supreme Court in exercise of the powers conferred under Section 482 of the Code, quashed the complaint and the process issued thereunder against the accused by holding that the acts alleged against the accused were not constituting alleged offences for want of satisfying ingredients of offences.

23. In the case of Punjab National Bank (supra), the Supreme Court has held that before issuing process, relevant facts and circumstances should be considered and the process issued mechanically on the basis of a complaint filed as vendetta to harass persons deserves to be quashed and set aside. In para 5 of the said judgment, the Supreme Court has made weighty observations which are advantageous to be reproduced hereunder:

> "It is also salutary to note that judicial process should not be an instrument of oppression or needless harassment. The complaint was laid impleading the Chairman, the Managing Director of the Bank by name and a host of officers. There lies responsibility and duty on the Magistracy to find whether the concerned accused should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued. At that stage the Court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengence...."

24. In the case of Nageshwar Prasad Singh (supra), the Supreme Court has held that in a case of agreement for sale of property where part of consideration is paid as earnest money and possession is also delivered to complainant as per the sale deed but the complainants are not performing their part in making full payment and where suit for specific performance filed by the complainant is already pending before Civil Court, the

liability, if any, arising by breach of contract is civil in nature and not criminal and criminal proceedings are liable to be quashed. In that case, criminal complaint which was filed for the offences under sections 415 (g) and 420 of IPC was quashed and the complainant was directed to pay compensatory costs for vexatious proceedings. In paragraph 3 of the said judgment, the Supreme Court has observed as under:

> "The later part thereof illustrates that at the time when agreement for sale was executed, it could have in no event been termed dishonest so as to hold that the complainants were cheated of the earnest money, which they passed to the appellant as part consideration, when possession of the total land involved in the bargain was passed over to the complainant-respondents and which remains in their possession. Now, it is left to imagine who would be interested in delaying the matter in completing the bargain when admittedly the complainants have not performed their part in making full payment. The matter is therefore before the Civil Court in this respect. The liability if any arising by the breach thereof is civil in nature and not criminal. We therefore allow this appeal and set aside not only the impugned orders of the High Court, but quash the proceedings too which are pending before the Magistrate. The complainant-respondents shall pay compensatory costs to the appellant for this vexatious proceedings which we assess at RS.10,000/- which the respondents are directed to pay to the appellants within six weeks from today."

25. In the case of Hridaya Ranjan Prasad Verma (supra), the Supreme Court has considered ingredients that are required for establishing offence of cheating under Section 415 of the IPC. It is held therein that ingredients of cheating is distinguished from mere breach of contract. Definition contemplates two separate classes of acts viz., deception by fraudulent or dishonest inducement and deception by intentional, but not fraudulent or dishonest inducement. In the second case, intentional deception must be shown to exist right from the beginning of the transaction. In the said judgment, in para 16, it has been observed by the Supreme Court as under:

> "Reading the averments in the complaint in their entirety and accepting the allegations to be

> true, the ingredients of intentional deception on the part of the accused right at the beginning of the negotiations for the transaction has neither been expressly stated nor indirectly suggested in the complaint. All that respondent 2 has alleged against the appellants is that they did not disclose to him that one of their brothers had filed a partition suit which was pending. The requirement that the information was not disclosed by the appellants intentionally in order to make respondent 2 part with the property is not alleged expressly or even impliedly in the complaint. Therefore the core postulate of dishonest intention in order to deceive the complainant- respondent 2 is not made out even accepting all the averments in the complaint on their face value. Thus the ingredients of the offence of cheating punishable under Section 420 IPC and its allied offences under sections 418 and 423 has not been made out. So far as the offences under Sections 469, 504 and 120-B are concerned even the basic allegations making out a case thereunder are not contained in the complaint. In such a situation continuing the criminal proceedings against the accused will be an abuse of the process of the court."

26. Applying the principles laid down by the Supreme Court in the aforementioned judgments to the facts of the present case, at the risk of repetition, be it stated that there is no agreement entered into between the complainant and GPPL. Even if it is assumed that there was oral agreement, in that case also there is a civil dispute between the parties and if at all according to the complainant there was a valid agreement to purchase flats by GPPL, then the suit for specific performance is the legal remedy and, therefore, the complainant has filed suit for specific performance of agreement against the GPPL which is pending in the Court of learned Civil Judge (S.D.)., Amreli.

27. The ratio laid down by the Supreme Court in the judgment rendered in the case of Medchl Chemicals & Pharma (P) Ltd., (supra) referred to by Ms. Nandini Joshi, learned APP is not applicable to the facts of the present case. In the case before the Supreme Court, the complainant-petitioner entered into an agreement dated 31.8.1997 with the respondent which inter alia records as below:

> "It is the responsibility of the party of the 2nd

part to maintain sufficient inventory of the raw materials as described in Annexure I in order to maintain consistent supplies to the manufacturer and not to cause any interruption/hindrance with the manufacturing activity by the manufacturer."

It is stated that on the basis of the aforesaid agreement the petitioner has lost a substantial amount of money to the extent of about one crore and the sufferance of loss has been by reason of specific assurance and representation which obviously turned out to be false. In the said fact situation, the Supreme Court has observed that on careful reading of the complaint it cannot be said that the complaint does not disclose the commission of an offence. The ingredients of offences under sections 415, 418 and 420 cannot be said to be totally absent on the basis of the allegations in the complaint. Therefore the Supreme Court while allowing the appeal, quashed and set aside the order of the High Court by which the complaint filed by the petitioner was dismissed, and restored the said complaint.

28. In the instant case, the criminal complaint filed by the complainant does not disclose commission of any offence as alleged against the petitioners as the ingredients to constitute the offences under sections 406, 415, 418, 420, 422, 463, 468 and 469 are absent as there was no intention on the part of the petitioners to commit criminal breach of trust or to deliver the property by cheating or dishonest inducement on the part of the petitioners nor there was any forgery committed by the petitioners as the complainant could not show any document which has been allegedly forged by the petitioners.

29. Apart from the aforesaid conclusion, there is no manner of doubt that petitioner No.3 is a nominee of Gujarat Maritime Board, petitioner No.4 is the Secretary of Department of Ports and Fisheries, petitioner No.5 is the Collector of Central Excise and they are public servants as defined under section 21 of IPC. Petitioner Nos. 7 and 8 are the nominee Directors of IDBI and UTI respectively and they can also be termed as Public servants. As per statutory provisions contained in section 197 of the Code and the law laid down by the Supreme court, no prosecution can be launched against them without prior consent of the respective Government as they were acting in discharge of their official duty.

30. In the case of Gauri Shankar Prasad (supra), the Supreme Court has held that if the act alleged had a

reasonable nexus with the official duty of the accused, no criminal proceedings could be initiated against him without obtaining sanction of the Government.

31. In the case of State through the CBI (supra), the Supreme Court has observed that bar under section 197 of the Code on the power of Court to take cognizance is mandatory. Where the actions alleged against a public servant and constituting the offences had been done in purported discharge of his duties, even though amounting to abuse of power, the Court could not, in absence of sanction under section 197 of the Code, take cognizance of the said offences.

32. Applying the principles laid down by the Supreme Court in the above referred to two judgments to the facts of the present case, since the petitioners Nos. 3, 4, 5, 7 and 8 who are nominee Directors are public servants, either of the Government nominee or were discharging duties in official capacity, by virtue of the office they were engaged in the Board of Directors of GPPL and therefore they were discharging their official duties and hence no criminal proceedings could have been filed against them without sanction of the respective Government.

33. Considering from the overall view of the matter and considering from any angle, I find that the petitioners have not committed any offence an therefore, I hold that the complainant has abused the process of law and filed malicious and vexatious complaint against the petitioners without any prima facie case against them to harass them on vendetta and therefore the said complaint, process issued thereunder and the inquiry ordered thereunder all are required to be quashed and set aside by allowing this petition.

34. For the foregoing reasons, the petition succeeds and accordingly it is allowed. Resultantly, Criminal Case No.44 of 2000 filed by the complainant against the petitioners before the Court of learned Judicial Magistrate, First Class, Mahuva, process issued thereunder and the inquiry ordered under section 202 of the Code are hereby quashed and set aside. Rule is made absolute.

(A.M. Kapadia, J.)

(karan)